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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.89 OF 2001

Mrs. Vimladevi Sadh)
Wd/o. Late Shri Kishanbhan Sadh)
residing at Flat No.207,)
'Mansarover', Bhausaheb Hire)
Marg, Napean Sea Road, Mumbai -)
400 006.) ... Petitioner

Versus

1. Jagmohandas B. Sidhpura)
by his C.A. Shri Devidas)
Kanjibhai Sidhpura, 299,Kanji)
Bhavan, S.V.P. Road, Mumbai -)
400 004.) ... (Orig. Plaintiff)
Respondent No.1

And

2. M/s. Kishanbhan & Co.)
Merchand, doing business at)
1st floor, Kahan Baugh - 12,)
2nd Carpenter Street, Mumbai)
- 400 004.) ... (Orig. Defendant)
Respondent No.2

Mr. Shailesh Shah with Mr. Arvind G. Shah for the petitioner.

Ms. Shafaq with Mr. A.S. Uraizee for respondent 1.

CORAM: SMT. RANJANA DESAI, J.

DATED: 28TH SEPTEMBER, 2005.

ORAL JUDGMENT:-

1. The petitioner is the applicant in R.A.E. & R. Suit No.1364/1489 of 1983. She is the wife of one Kishanbhan Sadh, who expired on 26/3/1992. Respondent 1 is the original plaintiff and respondent 2 is the original defendant. For the sake of convenience, the parties will

be referred to in this judgment as per their status in the suit.

2. The plaintiff claims to be the owner of the suit property. The defendant is the plaintiff's tenant. The suit was filed for a decree of eviction of the defendant on the ground that the defendant is not observing and performing the conditions of tenancy.

3. In short, it is the applicant's case that her husband Kishanbhan Sadh was the sole proprietor of M/s. Kishan Bhan & Co. He expired on 26/3/1992. According to the applicant, her lawyer had addressed a letter dated 17/7/1996 informing the plaintiff's lawyer about the death of her husband. The details of the heirs of Kishanbhan Sadh were also supplied. The applicant also filed an affidavit stating these facts on 19/8/1996 in the court. However, the plaintiff did not take any steps to bring the heirs of Kishanbhan Sadh on record.

4. In the above circumstances, the applicant filed an application in the said suit praying that notice be issued to the plaintiff to show cause why the suit should not be dismissed as having been abated.

5. On behalf of the plaintiff, his power of attorney holder filed an affidavit in reply. It was stated that the suit premises were let out to the partnership firm of the defendant and not to an individual. The contention

that the firm was a sole proprietary concern of Kishanbhan Sadh was denied. It was stated that that in the circumstances, the question of bringing on record the heirs and legal representatives of the deceased does not arise and there is no question of any abatement.

6. The applicant filed a reply to it and contended that at the inception of tenancy, the defendant was a partnership firm. However, when the instant suit was filed, the defendant was a proprietary firm.

7. By its order dated 16/7/1997, the trial court made the notice absolute. The trial court dismissed the suit as having abated. The plaintiff filed an appeal being Rent Act Appeal No.139 of 1997. By the impugned order, the lower appellate court allowed the appeal. The abatement was set aside and the suit was restored to file. The said order is challenged in this writ petition.

8. I have heard, at considerable length, Mr. Shah, the learned counsel appearing for the petitioner. Mr. Shah referred to Order XXII Rule 4 of the CPC and the relevant provision of the Limitation Act and contended that it was obligatory on the part of the plaintiff to bring the heirs of the defendant on record within 90 days from the date of death of the defendant or from the date of knowledge of the date of the death of Kishanbhan Sadh. He contended that even after the receipt of the letter

dated 17/9/1996, the plaintiff did not take any necessary steps to bring his heirs on record and, hence, the suit has abated. Mr. Shah pointed out that in the plaint M/s. Kishanbhan & Co. is described as a person and not as a partnership firm. Even in the plaint, the plaintiff has referred to the defendant as 'he'. It is nowhere stated that the defendant is a partnership firm.

9. Mr. Shah further pointed out that in the application dated 20/7/1998 filed by the plaintiff praying that the defendant be directed to deposit rent, the plaintiff has described the defendant as a proprietary firm and deceased Kishanbhan Sadh as the proprietor. He submitted that, therefore, from 1988, the plaintiff accepted M/s. Kishanbhan & Co. as a proprietary firm. He further pointed out that in the written statement filed by the defendant, the defendant described the firm as a proprietary firm and Kishanbhan Sadh as proprietor thereof. The written statement was verified by Kishanbhan Sadh as the proprietor of the defendant in April 1985. Mr. Shah contended that after the applicant filed the instant application, the plaintiff, for the first time, came out with a case that the suit premises were let out to the partnership firm of the defendant and not to any individual person. According to Mr. Shah, the lower appellate court did not take note of these circumstances and gave undue importance to the affidavit in rejoinder filed by the applicant where she has stated

that from the inception of tenancy, the defendant was a partnership firm. Mr. Shah contended that the lower appellate court has missed the categorical statement made by the applicant that when the suit was filed, the defendant was a proprietary firm. Mr. Shah further contended that the plaintiff has taken a peculiar stand. He says that the heirs need not be brought on record. The plaintiff, in effect, wants to walk away with a decree, by contending that there is no such requirement in law.

10. Mr. Shah also contended that the lower appellate court has wrongly relied upon Order XXX of the CPC when that was not even the case of the plaintiff. He submitted that in any case Order XXX does not further the case of the plaintiff. He submitted that on a plain reading of Order XXX Rule 4, it is clear that two or more persons may sue or be sued in the name of a firm and if any of such persons dies, it is not necessary to join the legal representative of the deceased as a party to that suit. He submitted that, therefore, this provision visualises a case where there is more than one partner and if one of them dies, there could obviously be no abatement and it is not necessary to bring on record the legal representative of the deceased partner. He submitted that this would not be applicable to the present case as the plaintiff has not stated as to which other partners are alive. He submitted that there has to

be some partner who can defend the suit and the court will not allow an absurd situation to arise whereby there is no one to defend the suit. In the circumstances, the plaintiff cannot take advantage of Order XXX, Rule 4 of the CPC.

11. Mr. Shah contended that the reliance placed by the trial court on the judgment of the Supreme Court in **Upper India Cable Co. & others v. Bal Kishan, AIR 1984 SC 1381** is misplaced because, the facts of that case materially differ from the facts of the instant case. In that case, the plaintiff instituted a suit for eviction against the defendant partnership firm and the defendants, who claimed to be the partners were added as proper parties. The question was whether on the death of a proper party, whose heirs and legal representatives are not substituted and against whom no relief was claimed would result in abatement of the suit. It was not contended there that the heirs and legal representatives of the deceased partners joined the firm or they were entitled to be taken as partners in the firm in the place of deceased partners. It is against this background that the Supreme Court observed that there was no abatement. He submitted that in the instant case merely M/s. Kishanbhan & Co. is the defendant and none of the other partners were added as party to the suit. The judgment of the Supreme Court in **Upper India Cable Co.'s case (supra)** is therefore not applicable to the present case.

Mr. Shah also referred to the Full Bench judgment of the Allahabad High Court in **Ajai Verma v. Ram Bharosey Lal & others, AIR (38) 1951 Allahabad 794** where the Full Bench of the Allahabad High Court has stated in the facts of that case that abatement should not be set aside as valuable right accrues in favour of legal representatives of the deceased. In the circumstances, Mr. Shah contended that the impugned order should be set aside.

12. Ms. Shafaq, the learned counsel appearing for the respondent on the other hand contended that the plaintiff had created tenancy in favour of the partnership firm in the year 1968. The partnership firm was a tenant. In the applicant's rejoinder, in paragraph 3, the applicant has admitted that the partnership was a tenant. She submitted that to the notice dated 6/6/1979, the defendant sent a reply dated 18/7/1979 but the defendant did not intimate to the advocate for the plaintiff that the firm was dissolved. Therefore, the firm continued to exist and there is no question of abatement. She submitted that, the impugned order does not merit any interference.

13. It appears to be an admitted position that the partnership was a tenant. According to the plaintiff, the suit is filed on that basis against the partnership firm. That partnership was a tenant is admitted by the applicant in her affidavit in reply. Her case, however, is that when the suit was filed, the defendant was a

proprietary concern. If that is so, it was for the applicant to satisfy the court that the partnership firm was dissolved or that it became a proprietary firm. The applicant ought to have produced the dissolution deed or other relevant documents. The applicant ought to have satisfied the court that the dissolution of the firm, or the change in the constitution of the firm was notified as required under section 63 of the Indian Partnership Act. To the notice issued by the plaintiff, the defendant sent a reply. But there is no whisper in the reply about the change in the constitution of the firm. It cannot be argued that information was not disclosed at that stage because the plaintiff did not ask for it. The fact that the plaintiff did not mention it, prima facie, indicates that the plaintiff was not aware of it. The defendant at that stage should have informed the plaintiff about the change in the firm's constitution. My attention was drawn by the learned counsel for the plaintiff to the affidavit dated 22/10/1996 filed by the constituted attorney of the plaintiff wherein it is stated that the plaintiff's advocate by his letter dated 4/10/1996 has requested the advocate for the defendant to give inspection of the documents to enable the plaintiff to file reply to the affidavit. But, no inspection of documents was given and, therefore, the plaintiff was compelled to file the reply without the documents. Till today, the defendant or the applicant has not given the inspection of documents to the plaintiff. If at all, there is any change in the constitution, no one would

know it better than the applicant. It does appear that the plaintiff has not been made aware of the exact position of the constitution of the firm. The courts must, as far as possible, try to ensure that parties get a chance to defend a suit and adjudication of rights is done after hearing both sides.

14. Hence, in my opinion, in the facts of this case, without going into the merits of the rival contentions, the following order would meet the ends of justice.

O R D E R

The applicant shall give inspection of all the documents to the plaintiff. After taking inspection of the documents, the plaintiff shall file an application for bringing on record the ex-partners of the said firm as defendants. The suit shall then proceed and should be expeditiously concluded. I am informed that ex-partner of the said firm Mr. Bhagwandas is in occupation of the suit premises. The learned counsel for the applicant says that he is in occupation of the suit premises since inception. The learned counsel for the plaintiff says that this fact is not stated in the written statement. I do not want to express any opinion on this aspect.

I wish to clarify that I have not expressed any opinion on the merits of the case of either parties and all contentions of the parties are kept open. The question of abatement can also be agitated at the stage of final arguments of the suit. The impugned order is set aside and is substituted by the present order.

15. Writ petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)